
Remarks

These remarks are submitted in response to the Final Office Action of May 11, 2011, and are being filed along with a Request for Continued Examination and a request for one month extension of time. At the time of the Office Action, claims 1, 3, 7-11, 24, 25 and 32-42 were pending. Claim 37 has been cancelled. Claim 43 has been added. No new matter has been added.

I. Claim Rejections Under 35 U.S.C § 103

Claims 1, 3, 7-11, 24, 25 and 32-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zhu (US Patent 6,404,614) in view of Montgomery (Montgomery, Douglas. Design and Analysis of Experiments. New York: John Wiley & Sons, Inc, 1997). For the reasons described below, Zhu does not qualify as prior art against the present application.

DISQUALIFICATION OF ZHU UNDER 35 U.S.C. §103(c)

It is respectfully asserted that Zhu is disqualified as prior art under 35 U.S.C. § 103(c). 35 U.S.C. § 103(c)(1) states:

Subject matter developed by another person, which qualifies as prior art only under one or more of subsections (e), (f) and (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person.

For the purposes of 35 U.S.C. § 103(c), a “person” may be a corporation. It is noted that the present application has an effective filing date of January 24, 2001 which is prior to the Zhu publication date of June 11, 2001. Hence, the only section of 35 U.S.C. § 102 that Zhu potentially qualifies under is 35 U.S.C. § 102(e), and Zhu and the claimed invention were both under an obligation of assignment to Paratek Microwave Inc at the time the claimed invention was made. Accordingly, Zhu does not qualify as prior art against the present application per 35 U.S.C. § 103(c), and the rejection is improper and must be withdrawn. Evidence of the obligation of assignment can be found recorded on April 27, 2001 at reel 011768 frame 0227 for Zhu and can be found recorded on April 23, 2001 at reel 011748 frame 0143 for the present

application (assignment of U.S. Patent No. 6,774,077 from which the present application claims priority as a divisional application).

II. Double Patenting Rejection

Claims 1, 3, 7-10, 32-37 and 41 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 3, 9, 10, 21 and 23 of copending Application No. 11/707,816. The provisional rejection is hereby acknowledged and will be addressed accordingly in this or the '816 application upon indication of allowable subject matter.

III. Conclusion

This application is in condition for allowance, which action is respectfully requested. It is respectfully requested that the Examiner call the undersigned if clarification is needed on any matter within this Amendment, or if the Examiner believes a telephone interview would expedite the prosecution of the subject application to completion. Please charge any deficiencies or credit any overpayment to Deposit Account No. 50-5199.

Respectfully submitted,

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